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COLLOQUIUM

Lest We Forget: *Buchanan v. Warley* and Constitutional Jurisprudence of the “Progressive Era”

*Richard A. Epstein**

The two principal papers in this collection are devoted to an analysis of one of the Supreme Court’s landmark decisions of the Progressive era, *Buchanan v. Warley*.¹ Both David Bernstein² and Michael Klarman³ reveal ambitions that go beyond a single case, as each discusses in detail a large part of the Progressive era jurisprudence on race relations that set the stage for *Buchanan v. Warley*. A short introduction is hardly the place to quibble with these papers on points of detail. But it is the place to raise one neglected theme that requires fresh emphasis. The constitutional jurisprudence that led to the disgraceful judicial performance on race relations in the Progressive era has—in its critical theoretical structure—much in common with our current constitutional jurisprudence on property

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1. 245 U.S. 60 (1917).

2. David Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799 (1998).

3. Michael Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 883 (1998).

rights and the police power. As the one notable exception to that sorry assessment, *Buchanan* represents a sharp and welcome departure from the dominant temper of its time.

Buchanan was a staged litigation challenge to a Louisville racial zoning ordinance. The ordinance prohibited blacks from living in neighborhoods designated as predominantly white, and likewise prohibited whites from living in neighborhoods designated as predominantly black.⁴ The purpose of the reciprocal prohibition was to bring the case within the scope of the Supreme Court's separate-but-equal doctrine; the Court had demonstrated a willingness to invalidate laws that did not satisfy this minimal requirement.⁵ But the power imbalances and intended disparate impact that led to the ordinance's adoption were clear, notwithstanding its facial neutrality. The prohibitions on blacks moving into white neighborhoods cut much more deeply than those in the opposite direction. It was the white power structure that passed the ordinance. Its members were not interested in moving into black neighborhoods; they were concerned with keeping blacks out of their neighborhoods.

To challenge this ordinance, a white seller and black buyer entered into a contract for the sale of land in a white-designated neighborhood. The contract's key clause read:

It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence.⁶

The black buyer refused to take title on the ground that the local zoning ordinance made it impossible for him to live on the premises. *Buchanan*, the white seller, then sought specific performance of the contract. The occupancy clause was added for litigation purposes, for without the clause the buyer could not have resisted specific performance because he would have been free to resell or lease the property to whites. After all, the ordinance did not deny the black buyer the right to own property in the white neighborhood; it just

4. *Buchanan*, 245 U.S. at 70-71.

5. See, e.g., *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 161-63 (1914) (finding a state law allowing railroad carriers to provide certain privileges to whites only violated the separate-but-equal principle, but holding that the plaintiff's allegations were "too vague and indefinite" to warrant injunctive relief).

6. *Buchanan*, 245 U.S. at 69-70.

denied him, and all other blacks, the right to live there. Not surprisingly, the Kentucky Court of Appeals upheld the Louisville ordinance as within the state police power.⁷ The Supreme Court then struck it down under the Fourteenth Amendment. What accounts for the difference?

To modern sensibilities, this constitutional challenge sounds like a harbinger of the Equal Protection Clause arguments that some thirty-six years later persuaded the Court to strike down school segregation in *Brown v. Board of Education*.⁸ But those developments still lay far in the future and rested on a range of sociological assumptions that had not found expression in an earlier age. Instructively, *Buchanan* was decided on grounds that had far more to do with the protection of property than with the guarantee of equal protection. Its property-based outcome rested on two key premises. First, property did not comprise merely the right to take title to land, or even the right to exclude others. Instead, property was defined to include an owner's rights to possess, use, and dispose of the lands as he sees fit. Second, to the extent that it imposed a state restraint on Buchanan's right to alienate his property, the Louisville ordinance amounted to a state deprivation of property.⁹ This broad definition of property has been compromised, if not rejected, in modern case law. All too often, modern courts equate property primarily with the right to exclude, and an owner's right of use and disposition receive little or no protection.¹⁰

But government restraint on property does not necessarily violate the Constitution as a deprivation of property rights. Even if left uncompensated, such restraints could well be justified under the state's police power, which allows the state to regulate where it advances the "safety, health, morals and general welfare" of the public.

7. See *Harris v. City of Louisville*, 177 S.W. 472, 476 (Ky. 1915).

8. 347 U.S. 483 (1954).

9. For a discussion of the distinction between state and private action, see *Corrigan v. Buckley*, 271 U.S. 323, 331-32 (1926), which found no substantial constitutional challenge on any substantive theory to the judicial enforcement of privately created racially restrictive covenants. The contrast between judicial enforcement of private rights and state action was stressed repeatedly throughout the decision. The decision's weakness was its failure to take into account the risk that the covenants in question represented some exertion of monopoly power. Its strength was its stout maintenance of the distinction between public and private action that was gutted a generation later in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

10. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-19, 1027 (1992) (holding that if state action deprives a property owner of all economically viable uses of his property then the action constitutes a "taking" under the Fifth and Fourteenth Amendments); *Andrus v. Allard*, 444 U.S. 51, 67-68 (1979) (holding that a state law prohibiting the sale of eagle feathers does not violate the Fifth Amendment Takings Clause).

During the Progressive era, a sharp and continuous battle raged over both the respect to be accorded to property rights, and the deference that the Congress, and particularly state legislatures, should receive under the police power.¹¹ During that period, the Supreme Court, in cases of little immediate relationship to race, often recognized that property rights, and more specifically, the freedom of contract could be limited in certain ways.

The question was, in what ways could the freedom of contract and property rights be limited under the police power? This issue is no arid doctrinal dispute. The Constitution makes no explicit reference to the police power in any of its great guarantees of individual rights against the state. Thus the definition and scope of the police power was driven by rival conceptions of the proper role of state power in a regime dedicated to the protection of life, liberty, and property. Outside the race area, the Court frequently cut down the scope of the police power. One critical case in this development, *Lochner v. New York*, held by a five-to-four vote that a law imposing a maximum ten-hour workday for certain classes of bakers did not fall within the scope of the police power, but was in fact a "labor" statute whose primary purpose was to restrain competition in the employment markets.¹²

I have little question that *Lochner* hit the nail right on the head. *Lochner* was a criminal prosecution, and it is instructive that the state was prepared to impose sanctions against *Lochner* even though none of his "necessitous" workers expressed any dissatisfaction with their working arrangements. But this naïve view of employment relations—letting workers decide where and how to work—was subject during the Progressive era to a relentless pounding from the leading intellectual figures of the time: Ernst Freund,¹³ Roscoe Pound,¹⁴ Learned Hand,¹⁵ Felix Frankfurter,¹⁶ and Louis Brandeis¹⁷ all condemned the rigid and dogmatic view of the police power nourished by oft-discredited dictates of laissez-faire jurispru-

11. James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 955, 965-67 (1998).

12. 198 U.S. 45, 52-54, 64 (1905).

13. See, e.g., Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 415-17 (1905).

14. See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615-22 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 479-87 (1909).

15. See, e.g., Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 501-09 (1908).

16. See, e.g., Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 362-73 (1916).

17. See, e.g., Louis D. Brandeis, *The Living Law*, 10 U. ILL. L. REV. 461, 467-71 (1916).

dence. What was needed in its place, so their theme ran, was an enlightened sociological jurisprudence that stressed not barren legal forms, but a realistic assessment of the material working conditions that these state laws were designed to rectify.¹⁸ Alas, this richer sociological account should have led those notable jurisprudential warriors to embrace with increased fervor the narrower laissez-faire version of the police power that they rejected, and that remains rejected today.¹⁹

And that is where *Buchanan v. Warley* and the other Progressive era race relations cases enter the picture. The sad but simple truth is that the Jim Crow resegregation of America depended on a conception of constitutional law that gave property rights short shrift, and showed broad deference to state action under the police power. At the outset of this period, *Plessy v. Ferguson* upheld the power of the state to require common carriers to offer their services only in segregated train compartments.²⁰ *Plessy* marked an unwarranted aggrandizement of the state police power. The traditional views of laissez-faire jurisprudence did not ignore the dangers of monopoly power, and the common law had long made it clear that common carriers did not have the right to exclude, but instead were under a public duty to provide service at reasonable rates on a nondiscriminatory basis.²¹

The racial discrimination mandated by the Louisiana statute was clearly at odds with the common law's hostility toward discrimination by common carriers.²² To be sure, that hostility did not translate into an absolute prohibition against discrimination, but the exceptions to it largely related to the imposition of different charges for different classes of service that were supplied at different cost. But *Plessy* revealed no differences in cost of service to white and black customers. The whole purpose of the statute was to introduce the invidious forms of racial classifications that were not allowed at com-

18. See Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 610-15 (1907).

19. See, e.g., *Home Builders & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding a mortgage moratorium statute against a contract clause challenge); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a general zoning ordinance against a police power challenge).

20. 163 U.S. 537, 548 (1896).

21. See H.W. Chaplin, *Limitations upon the Right of Withdrawal from Public Employment*, 16 HARV. L. REV. 555, 556-57 (1903) (discussing the fundamental duties of the common carrier).

22. For an extended discussion, see RICHARD A. EPSTEIN, *THE PRINCIPLE FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* chs. 2 & 10 (forthcoming 1998) (manuscript on file with author).

mon law. So once again it is important to keep straight who is a hero and who is a villain. The statute sustained in *Plessy* was flatly inconsistent with laissez-faire principles. By no stretch of the imagination does *Plessy* enshrine some indefensible common law baseline of individual property rights.²³ Nor does *Plessy* rest on some hidden affection for a theory of natural rights. By no stretch do *Plessy* and *Lochner* represent different applications of a common jurisprudence. *Plessy* represented the expansionist view of the police power that *Lochner* repudiated.

Berea College v. Kentucky tells a similar story.²⁴ There, the Supreme Court approved of Kentucky's efforts to segregate a private integrated college that operated under a state charter. The Supreme Court held that because Kentucky could issue or withhold its charter at pleasure, it therefore could amend the charter to require separation: The greater power to charter includes the lesser power to impose conditions on that charter. Once again, laissez-faire theory takes a much dimmer view of the conditions attached to state permits and charters. In general, it favors a system in which all persons, without discrimination, could receive charters of incorporation without the need for special legislation on their behalf.²⁵ *Berea College* violated the common law principle that, as with common carriers, the state monopoly over corporate charters imposed on government the obligation to operate in a nondiscriminatory fashion.

The *Plessy* and *Berea College* expansions of the state police power placed obstacles in the path of the plaintiffs in *Buchanan v. Warley*. The correct intellectual path for the Supreme Court would have been to overrule both decisions. But this was most unlikely given the sharp contemporary rise in the sentiments favoring segregation.²⁶ Instead, the Court distinguished *Plessy* and *Berea College*

23. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 42-45 (1993).

24. 211 U.S. 45 (1908).

25. For discussions of state charters, see Henry Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129 (1985); RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 107-26 (1993).

26. That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

Buchanan v. Warley, 245 U.S. 60, 80-81 (1917). After all, only a few years earlier Woodrow Wilson had resegregated the federal civil service as yet another urgent Progressive reform. See Klarman, *supra* note 3, 917-18 n.184 (citing Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WISC. MAG. HIST. 30 (1970); Nancy J. Weiss, *The Negro and the New Freedom: Fighting Wilsonian Segregation*, 84 POL. SCI. Q. 61 (1969); Kathleen L. Wolgemuth, *Woodrow Wilson and Federal Segregation*, 44 J. NEGRO HIST. 158 (1959)).

from the facts of *Buchanan*. The Court explained that:

In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afford the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of the property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law.²⁷

The Court's analysis is correct insofar as it protects private property from the assault of the Louisville ordinance. The obvious point is that title to land does not come from the state, but in good Lockean tradition, stems from a prior conveyance of a party who had acquired the property, not by state grant, but by first possession.²⁸ *Buchanan* thus treats the bottom-up origin of private property as a form of insulation against state power, and, to great benefit, ignores the fashionable temptation to treat all forms of private property as though they originated in state grants or state decrees. This language is misplaced, however, insofar as it purports to rescue *Plessy* and *Berea College*. To be sure, neither of those cases involved total exclusion. But both did involve the use of state monopoly power to dictate the organization of private institutions. In all cases, that power should be constrained by the nondiscrimination principle.

The City of Louisville sought to invoke the broad conception of the police power articulated in *Plessy* and *Berea College* when it styled its ordinance:

An ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.²⁹

Before the Supreme Court, Kentucky contended that this ordinance "tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of

27. *Buchanan*, 245 U.S. at 79-80 (quoting *Carey v. City of Atlanta*, 143 Ga. 192, 198 (1915)).

28. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 18-30 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690). For comment, see generally Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

29. *Buchanan*, 245 U.S. at 70.

property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.³⁰ The state's arguments could be sustained given the temper of the times if one followed the broad Holmesian account of the police power.³¹

Fortunately, on this occasion Holmes remained silent. With the path cleared, the state's arguments of course must fall before any sensible account of the police power. The explicit concern of the preservation of property values of white owners belies any race-neutral justification for the passage of the ordinance: Neutral in form, the only property values that mattered were those of whites. The statute's broad end (the purity of the races) has nothing to do with the prevention of nuisances or the safety, health, and general welfare of the public. The dangers of property deterioration come from bad neighbors regardless of color, so that the ordinance is both underinclusive (insofar as obnoxious white homeowners are excluded) and overinclusive (insofar as well-behaved black homeowners are excluded). And even if property values in white neighborhoods declined when well-behaved blacks moved in, those losses (like competitive losses) are the kinds that individuals are normally required to bear. The common law of nuisance covers such items as conduct injurious to the senses, obstructions of rights of way, and the withdrawal of lateral support.³² The combination of a strong defense of property rights and a narrow account of the police power sent this ordinance to its deserved rest.

The worst decisions of the Progressive era rested on the view that property rights were weak and police power justifications extensive. And that is precisely the view championed by today's advocates of broad state power. We should be wary of any sociological efforts to distinguish the moderu forms of government regulation from their discredited forbearers. Sociological jurisprudence has a funny way of backfiring. One generation embraces a statute on its own vision of

30. *Id.* at 73-74.

31. *See, e.g.,* *Noble State Bank v. Haskell*, 219 US. 104, 111 (1911) (stating that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare"). As Bernstein notes, Holmes's judicial expressions almost always follow from some earlier statement of the same position. *See* Bernstein, *supra* note 2, at 857. *See* in this instance, Oliver Wendell Holmes, *Book Notices*, 6 AM. L. REV. 132, 141 (1871), where Holmes adopted the majoritarian form of might makes right: "[I]f the will of the majority is unmistakable, and the majority is strong enough to have a clear power to enforce its will, and intends to do so, the courts must yield."

32. For codification of the common law definition of nuisance, see CAL. CIV. CODE § 3479 (West 1997).

the public interest; the next generation rejects it as a mischievous operation of state power. Thus, for example, one of the major Progressive causes was to justify minimum wage laws only for women. This effort reached its fruition in Louis Brandeis's successful argument before the Supreme Court in *Muller v. Oregon*.³³ Today, however, these laws are regarded not as enlightened protection of the weaker sex but rather as impermissible forms of protectionism that serve to insulate men from the competition of women.³⁴ As recently as 1964, the moral imperative behind the civil rights laws called for a color-blind statute.³⁵ Yet today's generation questions whether affirmative action programs are allowed under the law, or, as some have recently argued, required by the Equal Protection Clause.³⁶

Lest we forget, there is a lesson to be learned here. Madison reminded us that "enlightened statesmen will not always be at the helm."³⁷ This insight should lead us to a constitutional jurisprudence that does not ebb and flow with each change in intellectual fashion. The broad protection of property rights, limited by the need to prevent force, control fraud, and limit monopoly power, offers a recipe for constitutional protection that is good for the ages, and should be recognized as such. The tragic missteps in American race relations did not just happen to coincide with the Progressive era. They happened *because* the Progressive era championed a conception of government that included a broad police power and weak property rights. This conception carries over to the present day. Before praising sociological jurisprudence, we should recall that virtuous rationales for government action were, and are, often thin cloaks for partisan favor, as in *Lochner* itself. In praising the good that can come from government discretion, we should never forget the evils it has wrought. So before we rail once more against state protection of property

33. 208 U.S. 412 (1908).

34. See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (striking down a law that gave preference to males serving as estate administrators as a violation of the Equal Protection Clause); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 958-59 n.14 (1984) (surveying the law of equal protection and gender and arguing for stronger constitutional enforcement of sex-based equality).

35. It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1994).

36. In *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), vacated by 122 F.3d 692 (9th Cir. 1997), plaintiffs argued that the California initiative Proposition 209, an anti-affirmative action ban, violated the Equal Protection Clause.

37. THE FEDERALIST NO. 10 (James Madison).

rights, we should at least pause to recall the good that it did achieve in *Buchanan v. Warley*. Lest anyone forget the temper of the times in which that case was decided, read the articles that follow, and weep.